Th'ng Hai Lam v Public Prosecutor

HIGH COURT (IPOH) — CRIMINAL REVIEW NO 43–12 OF 2009
CHOONG SIEW KHIM JC
10 JUNE 2011

Criminal Procedure — Revision — Coroner's inquiry — Inquest into cause of death — Correctness, legality or propriety of coroner's finding — Whether any party criminally involved in cause of death — Whether cause of death attributed to autoerotic fatalities — Whether magistrate erred in his finding — Whether any basis to vary or set aside magistrate cum coroner's finding — Criminal Procedure Code ss 317 & 323

Evidence — Expert evidence — Conflicting testimony — Causes of death — Findings of two forensic pathologists — Opinion contradict each other — No clear or obvious evidence of murder — Whether open to court to prefer evidence of one expert over another — Whether proper to act on opinion of one expert although it contradicted another expert

The applicant who was the father of the deceased person (Th'ng Boon Siang), applied for a revision of the finding on the cause of death of the deceased by the magistrate who sat as a coroner. The deceased was found dead, his body was found in the back room of the ground floor of his shop house. At the request of the counsel for the applicant, the court allowed the appointment of Dr Bhupinder Singh (the senior consultant forensic pathologist of Hospital Pulau Pinang) to provide a second opinion on the post-mortem report done on the deceased by forensic pathologist Dr Mohammad Shafie bin Othman @ Osman of Hospital Besar, Ipoh. According to Dr Mohammad Shafie, the deceased died as a result of autoerotic asphyxia. Dr Bhupinder in his report, which was in direct conflict with Dr Shafie's post-mortem report, was of the opinion that the way the body was found, the bleeding and injuries on the body, the way the ligatures were tied were definitely suggestive of foul play. He further stated that the suggestion of sexual asphyxia was a misnomer and he opined that the case should be reviewed and investigated as a possible homicide. In his testimony in court, Dr Bhupinder was of the opinion that the cause of death was a result of suffocation or asphyxia due to suffocation. Based on the existing facts and the evidence adduced during the inquest as well as additional evidence adduced before the court pursuant to s 317 of the Criminal Procedure Code ('CPC'), the court had to consider whether the coroner had erred in his finding namely, that no criminal elements were involved, the cause of death was due to autoerotic fatalities with the verdict as misadventure. The court had to satisfy

itself as to the correctness, legality or propriety of such finding under s 323 of the CPC.

Held, dismissing the application to vary or set aside the magistrate cum coroner's finding:

(1) The report and testimony of Dr Shafie's was preferred and accepted by the court as the more credible of the two. It was open to a court to prefer the evidence of one expert to that of another and it would not be improper to act on the opinion of one expert although that was contradicted by another expert (see para 19).

(2) Dr Shafie's did not unequivocally state that he was wrong and had made a mistake with regard to the cause of death. Instead, he ultimately and specifically stood by his findings and conclusion in his post-mortem report. It must be noted that Dr Shafie in conducting the post-mortem examination had a first hand look at the body in the circumstances it was found and brought to him (see para 20).

(3) Although police investigations were found wanting in that the six finger prints lifted at the scene were not sent for analysis, the however had not impacted the expert findings of Dr Shafie and in this case, no suspect or any person was arrested in connection with the death. Although the case was investigated under s 302 of the Penal Code, there was no clear or obvious evidence that the deceased was murdered (see para 21).

(4) With regard to the letter (P5) allegedly written by the Indonesian maid of the deceased and which letter was produced before this court, the investigating officers had absolutely no knowledge about the said letter in the course of their investigations. No evidence was adduced as to who P5 was given, when, how and other details and without calling the maker of this letter, the basic requirement of its authenticity and the truth of its contents was suspicious and doubtful. Hence, not much weight ought to be given to this letter in the applicant's quest for the coroner's finding to be set aside or varied (see para 22).

[Bahasa Malaysia summary

Pemohon yang merupakan bapa si mati (Th'ng Boon Siang), telah memohon semakan penemuan berhubung sebab kematian si mati oleh majistret yang bertindak sebagai koroner. Si mati telah didapati mati, di mana mayatnya ditemui di bilik belakang di tingkat bawah rumah kedainya. Atas permintaan peguam pemohon, mahkamah ini telah membenarkan pelantikan Dr Bhupinder Singh (konsultan kanan pakar patologi forensik Hospital Pulau Pinang) untuk memperoleh pendapat kedua berhubung laporan post-mortem yang dilakukan atas si mati oleh pakar patologi forensik Dr Mohammad Shafie bin Othman @ Osman dari Hospital Besar, Ipoh. Menurut Dr Mohammad Shafie, si mati telah meninggal dunia akibat *autoerotic asphyxia*. Dr Bhupinder

dalam laporannya, yang bercanggah dengan laporan post-mortem Dr Shafie, berpendapat bahawa cara mayat itu ditemui, pendarahan dan kecederaan pada mayat itu, cara jerutan diikat mencadangkan wujud perbuatan khianat. Dia selanjutnya menyatakan bahawa cadangan asfiksia seksual adalah nama yang tidak kena dan dia dia berpendapat bahawa kes itu patut disemak semula dan disiasat kerana mungkin berlaku homisid. Dalam testimoninya di mahkamah, Dr Bhupinder berpendapat bahawa sebab kematian adalah akibat sesak nafas atau asfiksia akibat sesak nafas. Berdasarkan fakta dan keterangan yang ada dikemukakan semasa inkues dan juga keterangan tambahan yang dikemukan di hadapan mahkamah ini menurut s 317 Kanun Acara Jenayah ('KAJ'), mahkamah ini perlu mempertimbangkan sama ada koroner tersilap dalam penemuannya iaitu, bahawa tidak terdapat elemen-elemen jenayah yang terlibat, sebab kematian adalah akibat kematian autoerotik dengan keputusan sebagai nahas. Mahkamah ini perlu berpuas hati tentang ketepatan, kesahan atau kesesuaian penemuan tersebut di bawah s 323 KAJ.

Diputuskan, menolak permohonan untuk mengubah atau mengetepikan penemuan majistret yang juga bertindak sebagai koroner:

(1) Laporan dan testimoni Dr Shafie lebih dipilih dan diterima oleh mahkamah ini sebagai yang boleh dipercayai antara yang dua itu. Adalah terbuka untuk mahkamah memilih keterangan seorang pakar daripada seorang lain dan ia tidaklah tidak wajar untuk bertindak atas pendapat seorang pakar meskipun ia ditentang oleh seorang pakar lain (lihat perenggan 19).

(2) Laporan dan testimoni Dr Shafie tidak dengan jelas menyatakan bahawa dia telah melakukan kesalahn dan membuat kesilapan berkaitan sebab kematian tersebut. Sebaliknya, dia pada dasarnya dan secara spesifik berdiri kukuh dengan penemuan dan kesimpulannya dalam laporan post-mortemnya itu. Perlu ditekankan bahawa Dr Shafie semasa mengendalikan pemeriksaan post-mortem telah dapat melihat secara langsung mayat itu dalam keadaan ia ditemui dan yang dibawa kepadanya (lihat perenggan 20).

(3) Meskipun siasatan polis didapati kekurangan di mana enam kesan jari telah diambil di tempat kejadian tidak dihantar untuk analisis, ini bagaimanapun tidak memberi kesan kepada penemuan pakar Dr Shafie dan dalam kes ini, tiada orang yang disyaki telah ditangkap berhubung kematian itu. Walaupun kes tersebut telah disiasat di bawah s 302 Kanun Keseksaan, tiada keterangan jelas atau nyata bahawa si mati telah dibunuh (lihat perenggan 21).

(4) Berhubung surat (P5) yang dikatakan telah ditulis oleh orang gaji Indonesia si mati dan yang mana surat itu telah dikemukakan di hadapan mahkamah ini, pegawai-pegawai siasatan tiada langsung pengetahuan berhubung surat tersebut sewaktu siasatan mereka. Tiada keterangan

telah dikemukakan berhubung siapa P5 telah diberikan, bila, bagaimana dan butiran lain dan tanpa memanggil pembuat surat ini, keperluan asas keasliannya dan kebenaran kandungannya disyaki dan diragui. Justeru itu, tidak banyak beban patut diberikan kepada surat ini dalam permohonan pemohon agar penemuan koroner diketepikan atau diubah (lihat perenggan 22).]

Notes

For cases on conflicting testimony, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1690–1694.

For cases on coroner's inquiry, see 5(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3318–3319.

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

PP v Shanmugam & Ors [2002] 6 MLJ 562, HC (folld)

Legislation referred to

Criminal Procedure Code ss 317, 323, 341A, 371

Penal Code s 302

Pardeep Singh (Pardeep Singh & Co) & Baldip Singh (Baldip Dil & Partners) for the applicant.

Aiza bt Khairuddin (Deputy Public Prosecutor) for the prosecution/respondent.

Choong Siew Khim JC:

[1] This was an application by Th'ng Hai Lam, the father of the deceased person (Th'ng Boon Siang) for a revision of the finding of the magistrate of the Magistrate's Court at Sitiawan who set as a coroner. The matter finally was brought before this court after a round of complaints submitted by the deceased's family to various authorities with regard to the finding on the cause of death.

[2] After the proceedings to inquire as to how the deceased came by his death, the magistrate came to this finding:

> Setelah meneliti nota-nota keterangan dari saksi-saksi dan merujuk laporan post-mortem dari Pakar Patologi Dr Shafie, punca kematian simati adalah disebabkan 'autoerotic fatalities'. Verdict: misadventure.

[3] The deceased was found dead on the morning of 29 May 2003. His body was found in the back room of the ground floor of his shop house.

[4] From the outset, counsel for the applicant wanted a second opinion on

A the post-mortem report done on the deceased by forensic pathologist Dr Mohammad Shafie bin Othman @ Osman of Hospital Besar, Ipoh (then known as). I allowed his application in the interest of justice and the opinion of Dr Bhupinder Singh (the senior consultant forensic pathologist of Hospital Pulau Pinang) was sought based on an examination of amplified photographs B taken during the post-mortem and at the scene (P2(1–18), P2(19–20) dan P2A(1–29) and the post-mortem report itself (note: the photographs stated here are enlargement copies of the photographs given to applicant's counsel by the respondent). Dr Bhupinder came up with his own report (P4), the contents of which were noted by me. P4 is in direct conflict with Dr Shafie's C post-mortem report. It was precisely due to this that it was thought necessary additional evidence ought to be taken pursuant to s 317 of the Criminal Procedure Code. (Note: s 371 of the CPC under Chapter XXXI applies to proceedings under Chapter XXXII pertaining to inquires of deaths — see s 341A of the Criminal Procedure Code).

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[5] My duty is to consider, based on the existing facts and evidence adduced during the inquest as well as additional evidence adduced before me, whether the coroner had erred in finding the way he did at the end of the inquest which E was that no criminal elements were involved, the cause of death was due to autoerotic fatalities with the verdict as misadventure. I have to satisfy myself as to the correctness, legality or propriety of such finding under s 323 of the CPC.

[6] I adopt what was stated in *Public Prosecutor v Shanmugam & Ors* [2002] F 6 MLJ 562:

> There was no reason why an opinion of the magistrate as to the manner in which the deceased came by his death may not be reviewed. So long as miscarriage of justice had been committed by a magistrate, in that the correctness, legality or propriety of his findings were found wanting, a High Court judge was entitled to invoke his G statutory revisionary powers. (See also *Re Rumie Mahlie, deceased* [2007] 10 CLJ 697).

[7] Counsel for the applicant submitted that the deceased did not die as a H result of autoerotic asphyxia by their contention that criminal elements were involved. They relied on Dr Bhupinder's report (P4) after he had examined photographs taken during the post-mortem and at the scene (ie P2(1–18), P2(19–20) and P2A(1–29) and on his review of Dr Shafie's post-mortem report.

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[8] Dr Bhupinder in his report was of the opinion that the way the body was found, the bleeding and injuries on the body, the way the ligatures were tied were definitely suggestive of foul play. He went on to state that the suggestion of sexual asphyxia was a misnomer and he opined that the case should be

reviewed and investigated as a possible homicide in view of his findings. In his testimony in court, Dr Bhupinder was of the opinion that the cause of death was a result of suffocation or asphyxia due to suffocation.

[9] It was submitted for the applicant that if the cause of death was sexual asphyxia there would have been internal neck injuries with reference to para (4) of P4 which states:

> No injuries were seen in the neck region during internal examination of the neck, ruling out the possibility of strangulation or hanging.

[10] Dr Shafie before me disagreed with this by explaining that he viewed the strangulation in this case as ligature strangulation ('jerutan di leher') and this would not necessarily injure the neck internal structure. As in a case of hanging, not all hanging cases would show signs of internal injury.

[11] Another point of divergence between the two pathologists was with regard to the raffia string tied and wound around the lower limbs of the deceased. Dr Bhupinder considered that this form of tying was with the aim to transport or move the body. Dr Shafie disagreed with this because he viewed the raffia string though tied haphasardly was a form of bondage which was an element in or characteristic of an autoerotic act.

[12] The next point in contention was where Dr Bhupinder stated in his report that some abrasions seen around the mouth on the lateral surfaces and upper part of the neck indicated that the cellophane tape (seen around the neck) was over the mouth and nose regions due to which the deceased would have suffocated (para 1(C) of P4). Dr Shafie disagreed that the cellophane tape was used to cover the mouth until death resulted. He went to say that if one hand was used to 'mencekik di atas cellophane tape', the signs of asphyxia would show but this was not consistent with the present case since injuries in the internal neck structure were not seen during his post-mortem examination. According to Dr Shafie, the external injuries were not due to autoerotic asphyxia but were caused by a struggle and attempt for release subsequent to the autoerotic process and act itself.

[13] Contrary to his own finding about the superficial slash wounds or sharp weapon injuries over the right and left sides of the neck and right lower cheek area (para (3) of P4), Dr Bhupinder when questioned by me conceded that it was possible these were caused by the sharp edges of the cellophane tape.

[14] Dr Bhupinder concluded that the tying was done at different levels of the body, not by the deceased himself but by someone else due to the fact that

one end of the nylon string was cut while the other end was burnt. He added that it was possible that the string was cut into two before the deceased was tied up.

[15] Dr Shafie however maintained that the string that was tied from the legs to the hands and then to the neck was the nylon rope. He however said this:

> Saya tidak boleh menunjukkan terdapat sambungan ikatan tali nylon pada kaki hingga ke tangan kerana saya berpendapat sambungan yang ada telah dipotong sebelum dibawa untuk pemeriksaan oleh saya.

[16] There was confirmation of this by the nephew of the deceased (SP3 during the inquest) that he cut the rope between the hands and the legs to enable him to check whether the deceased was still alive when he was brought to the scene by the wife of the deceased (SP6).

[17] Dr Shafie testified that the tell-tale or classic signs of autoerotic asphyxia was the usage of an apparatus with a covering or padding ('pelapik') to avoid pain to the actor. He opined that the use of padding was the best indicator of an autoerotic practice or act. He referred to the pants of a child ('seluar kanak-kanak') which was used as a padding around the wrists. In this respect, I quote from his testimony:

> Kehadiran pelapik bertujuan untuk menghindarkan kesan sakit akibat jerutan pada bahagian pergelangan tangan. Dengan kehadiran pelapik ini saya berpendapat bahawa terdapat sambungan pada awalnya di antara kaki, tangan dan leher.
>
> Untuk tujuan mengangkut mayat atau dispose body, biasanya mayat akan dibungkus terlebih dahulu sebelum diikat. Tambahan pula ikatan yang dibuat tidak perlu pelapik seperti yang dilihat di pergelangan tangan dan sekeliling leher.
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> Dalam pemeriksaan saya menunjukkan bahawa pelapik di keliling pergelangan tangan merupakan sehelai seluar kanak-kanak wama merah jambu cerah dilapik terlebih dahulu sebelum lilitan tali nylon dibuat.
>
> Kehadiran seluar kanak-kanak ini tidak bersesuaian sekiranya dilakukan oleh orang lain.

[18] It was clear to Dr Shafie that the presence of the padding was not consistent with Dr Bhupinder's finding that the deceased was tied up by another person. In any event, Dr Bhupinder inexplicably failed to refer to and explain the padding on the wrist in particular.

[19] After having evaluated and compared the evidence and findings of the two forensic pathologists, I am more inclined to prefer and accept Dr Shafie's report and testimony as the more credible of the two. It is open to a court to

prefer the evidence of one expert to that of another and it would not be improper to act on the opinion of one expert although that is contradicted by another expert (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232).

[20] I state this despite what Dr Shafie said at one stage of severe and lengthy cross-examination that there could be somebody else involved and that his opinion may be wrong. In light of this I had re-read and evaluated his evidence in totality and nowhere did he admit that he had made a mistake. He did not unequivocally state that he was wrong and had made a mistake with regard to the cause of death. Instead he ultimately and specifically stood by his findings and conclusion in his post-mortem report. It must be noted that Dr Shafie in conducting the post-mortem examination had a first-hand look at the body in the circumstances it was found and brought to him.

[21] Although police investigations were found wanting in that the six finger prints lifted at the scene were not sent for analysis, this however in my opinion had not impacted the expert findings of Dr Shafie and in this case, no suspect or any person was arrested in connection with the death. ASP Chan Teck Paing (who took over investigations on 14 July 2005) said that although the case was investigated under s 302 of the Penal Code, there was no clear or obvious evidence that the deceased was murdered.

[22] With regard to the letter (P5) dated 7 July 2003 allegedly written by the Indonesian maid of the deceased and which letter was produced before this High Court, both C/Insp Rahman Din (the first investigating officer) and ASP Chan Teck Paing never had sight of it. Neither were they informed about it and its contents. In short, they absolutely had no knowledge about this letter in the course of their investigations. According to ASP Chan if he had known of its contents he would have investigated further especially with regard to the writer of the letter. As correctly pointed out by the learned deputy public prosecutor, a pertinent question arises as to why P5 surfaced after the family of the deceased lodged a police report on 21 December 2009 pertaining to it vide Sitiawan Report 11528/09 (which was not tendered as an exhibit) when the letter was dated 7 July 2003 and purportedly written on that date. No evidence was adduced as to who P5 was given, when, how and other details and without calling the maker of this letter, the basic requirement of its authenticity (though marked as P5) and the truth of its contents is suspicious and doubtful. Not much weight ought to be given to this letter in the applicant's quest for the coroner's finding to be set aside or varied.

CONCLUSION

[23] Notwithstanding the additional evidence taken before me, the verdict

A of 'misadventure' by the coroner with cause of death attributed to autoerotic fatalities has been correctly arrived at without any evidence of any person criminally concerned in the cause of death. There is no basis for me to vary or set aside the magistrate cum coroner's finding in the circumstances.

B **[24]** On a last note, in cases of this nature which are relatively uncommon and seldom reported in our country, it is not easy to convince family and relatives of the deceased about the perverted sexual element connected with such death.

C *Application to vary or set aside the magistrate cum coroner's finding dismissed.*

Reported by Ashgar Ali Ali Mohamed

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